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File: A72 444 612 - Bradenton

Date: MAR - 8 2000

In re: JODEL CLERJUSTE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ronald Haber, Esquire

ON BEHALF OF SERVICE: James K. Grim
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Withholding of removal

The case before us has a lengthy procedural history. In a decision dated April 2, 1998, an Immigration Judge found that the respondent's aggravated felony conviction was for a per se particularly serious crime and that he was therefore removable as charged and ineligible for relief from removal. On January 22, 1999, this Board remanded the record for further consideration of the respondent's eligibility for withholding of removal. The respondent then appealed from the Immigration Judge's decision, dated February 2, 1999, which found, after individualized consideration, that the respondent had been convicted of a particularly serious crime that rendered him ineligible for withholding of removal under the exception specified in section 241(b)(3)(B)(ii) of the Act. Due to changes in the federal regulations, we again remanded the record on June 9, 1999, to allow the respondent to apply for relief under the Convention Against Torture and for the Immigration Judge to consider in the alternative, whether or not the respondent had demonstrated clear probability of persecution in Haiti.

The respondent has now appealed from an August 25, 1999, Immigration Judge decision finding that he had not demonstrated eligibility for relief under the Convention or for withholding of removal and ordering him removed as charged to Haiti. The appeal will be sustained. The request for oral argument is denied. 8 C.F.R. § 3.1(e).

The respondent, represented by new counsel, argues, inter alia, that he is not removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony after admission because his conviction occurred before his admission to the United States. The Immigration and Naturalization Service has not responded to

this argument by the respondent and, under controlling law, we must agree with the respondent's position on this issue. The pertinent facts of this case are not in dispute. The respondent entered the United States without inspection in October of 1991. On November 4, 1996, he was convicted in the Seventeenth Circuit Court in and for Broward County, Florida, of battery and indecent assault, in violation of sections 784.03 and 800.04 of the Florida Statutes.[1] Thereafter, on February 4, 1997, he adjusted his status to lawful permanent resident. The Notice to Appear (Form I-862) was issued on February 2, 1998.

The only ground for removability charged against the respondent is:

> Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43) of the Act.

Exh.1 (emphasis added)(quoting section 237(a)(2)(A)(iii) of the Act). Admission is defined in the Act at section 101(a)(13)(A) as:

> the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

Id. As we have held in a recent precedent decision, an alien who adjusts his status to lawful permanent resident is considered to have accomplished an "admission" as defined by this section. Matter of Rosas, Interim Decision 3384 (BIA 1999). However, as noted above, the respondent here was convicted of his crime before he adjusted his status. There is no allegation or evidence that he was otherwise admitted into the United States prior to his conviction. As the record does not support a finding that the respondent has been convicted of an aggravated felony after admission, the proceedings will be terminated.

ORDER: The proceedings are terminated.

FOR THE BOARD

[1] The respondent further notes that his conviction has been vacated and a new trial ordered. The respondent argues, therefore, that he no longer has a final conviction. We need not reach this issue, but note that the vacation of the order is on direct appeal.